IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

RECEIVED
JUL 17 1978
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 78-98

GRAVES TRUCK LINE, INC.,
Petitioner,

vs.

APPLETON ELECTRIC COMPANY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MARTHA M. JENKINS,
77 West Washington Street,
Chicago, Illinois 60602,
Counsel for Petitioner.

July 17, 1978.

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

INDEX.

PAGE

Opinion Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provisions, Statutes and Rules Involved 3

Statement of the Case 6

Reasons for Granting the Writ 10

The decision below has decided important questions of federal law which have not, but should be, settled by this Court 10

A defendant has the right to default on the issue of liability where there is an open-ended complaint as to relief claimed, and still be heard, as a matter of due process of law, on the question of damages and the jurisdictional validity of the underlying default 11

Entry of the default judgment herein is in blatant violation of the Federal Rules of Civil Procedure, and is therefore void or voidable and should have been vacated 13

The application of the statute of limitations to defendants in a defendant class context has never been determined by this Court 15

The decision below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court, as to call for an exercise of this Court's power of supervision 20

Conclusion 23

Appendix 1 (Opinion of Court of Appeals) A1

Appendix 2 (Transcript of Oral Argument) A2

Appendix 3 (District Court Order) A11

Appendix 4 (District Court Order) A19

Appendix 5 (District Court Default Order) A22

AUTHORITIES CITED.

Cases.

American Pipe & Construction Co. v. Utah, 414 U. S. 538 (1974) 16, 17

Appleton Electric Co. v. Advance-United Expressways, 494 F. 2d 126 (7th Cir. 1974) 11

Bass v. Hoagland, 172 F. 2d 205 (5th Cir. 1949) 11

Bela Seating Co. v. Advance Transportation Co., 344 F. Supp. 854 (N. D. Ill. 1972) 15, 16

Bowles v. Fode, 8 F. R. Serv. 8a, 52, Case 1 (D. N. D. 1945) 13, 14

Carothers v. Western Transportation Co., 412 F. Supp. 1158 (S. D. Ill. 1976) 15

Chevalier v. Baird Savings Ass'n, 72 F. R. D. 140 (E. D. Pa. 1976) 18

Christopher v. Brusselback, 302 U. S. 500 (1938) 17

Container Corp. of America v. Admiral Merchants Motor Freight, Inc., 489 F. 2d 825 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 1581 (1974) 15, 16, 18

Davis v. National Mortgage Co., 320 F. 2d 90 (2d Cir. 1963) 15

Employers Reinsurance Corp. v. Bryant, 299 U. S. 374 (1937) 17

Flaks v. Koegel, 504 F. 2d 702 (2d Cir. 1974) 15

Fuentes v. Shevin, 407 U. S. 67 (1972) 11

Hellerstein v. Mather, 360 F. Supp. 473 (D. Colo. 1973) 18

Hickman v. Taylor, 329 U. S. 495 (1947) 20

Midstate Horticultural Co. v. Pennsylvania R. R., 320 U. S. 356 (1943) 15

North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U. S. 601 (1975) 11

Sniadach v. Family Finance Corp., 395 U. S. 337 (1969) 11

Thorpe v. National City Bank, 274 F. 200 (5th Cir. 1921) 15

United States v. Fong, 182 F. Supp. 446 (N. D. Cal. 1959), *aff'd*, 300 F. 2d 400 (9th Cir. 1962), *cert. denied*, 370 U. S. 938 (1962) 11

Wisconsin Bridge & Iron Co. v. Illinois Terminal Co., 88 F. 2d 459 (7th Cir. 1937) 15

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U. S. 100 (1969) 17

Miscellaneous.

5th and 14th Amendments, United States Constitution ... 3

28 U. S. C. § 1254(1) 2

28 U. S. C. § 1292(b) 9

49 U. S. C. § 16(f)(3) 4, 15, 19

FRCP 4(a) 4

FRCP 5(a) 2, 4, 10, 13, 14, 20

FRCP 8(a) 2, 4, 10, 13, 14, 20

FRCP 23 ..... 7, 16

FRCP 54(b) 5, 9

FRCP 54(c) 2, 5, 9, 10, 13, 14, 20

FRCP 55(b)(1) 2, 6, 9, 14

FRCP 55(b)(2) 2, 6, 9, 14

3B Moore's *Fed. Prac.* ¶ 23.90[3], p. 1652 17

6 Moore's *Fed. Prac.* ¶ 54.61, p. 1231 14

10 Wright & Miller *Fed. Prac. & Proc.* § 2683, pp. 258-259 14

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977.

No.

GRAVES TRUCK LINE, INC.,

Petitioner,

vs.

APPLETON ELECTRIC COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

The petitioner, Graves Truck Line, Inc. respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on April 18, 1978.

OPINION BELOW.

The opinion of the Court of Appeals is not reported, but appears as Appendix 1. The ruling of the court was based on the transcript of its remarks at oral argument. The transcript of oral argument appears as Appendix 2. The opinion of the District Court for the Northern District of Illinois, Eastern Division, appears as Appendix 3. An amendment to that opinion allowing

for an interlocutory appeal to the Seventh Circuit appears as Appendix 4. A copy of the District Court order establishing the default procedure which is the subject of all of the other opinions appears as Appendix 5.

JURISDICTION.

The judgment of the Court of Appeals for the Seventh Circuit was entered on April 18, 1968. This Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

Whether the trial court erred in denying the motion of Graves Truck Line, Inc. ("Graves") to quash a garnishment summons and to vacate the underlying default judgment where:

(a) The default judgment is void because its entry violated Graves' right to due process of law;

(b) The default judgment was entered in violation of several Federal Rules of Civil Procedure ("FRCP") relating to claims for relief, including:

(1) FRCP 54(c) requiring that a default judgment may be entered only for the relief prayed for in the demand for judgment in the complaint;

(2) FRCP 8(a)(3) requiring that the complaint set forth "a demand for judgment for the relief to which he [the pleader] deems himself entitled"; and

(3) FRCP 5(a) requiring service of any pleading asserting new or additional claims for relief against parties in default in the manner provided for service of summons in FRCP 4; and

(c) The default judgment was entered in violation of FRCP 55(b)(1) and (2) in that the judgment is not for a sum certain which might be entered by the clerk, but for an unliquidated amount, and is of a nature as to require the court to hold a hearing at which Graves is entitled to appear and contest damages.

Whether a party in default may raise the defense of a jurisdictional statute of limitations.

Whether, or during what period of time, the statute of limitations is tolled as to an unnamed defendant who fits within the definition of a defendant class, elects to opt-out of the class and is subsequently brought back into the litigation by service of summons and complaint.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED.

Fifth Amendment to the United States Constitution.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment to the United States Constitution.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

49 U. S. C. § 16(3)(f)

(3) *Limitation of actions.*—

* * * * *

(f) A complaint for the enforcement of an order of the commission for the payment of money shall be filed in the district court or the State court within one year from the date of the order, and not after.

FEDERAL RULE OF CIVIL PROCEDURE 4(a)

Process.

(a) *Summons: Issuance.* Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants.

FEDERAL RULE OF CIVIL PROCEDURE 5(a)

Service and Filing of Pleadings and Other Papers

(a) *Service: When Required.* Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. * * * *

FEDERAL RULE OF CIVIL PROCEDURE 8(a)(3)

General Rules of Pleading

(a) *Claims for Relief.* A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain . . . (3) a demand for judgment for the relief to which he deems himself entitled. Relief in the alternative or of several different types may be demanded.

FEDERAL RULE OF CIVIL PROCEDURE 54(b) and (c)

(b) *Judgment Upon Multiple Claims or Involving Multiple Parties.* When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of the parties.

(c) *Demand for Judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

FEDERAL RULE OF CIVIL PROCEDURE 55(b).

(b) *Judgment.* Judgment by default may be entered as follows:

(1) *By the Clerk.* When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

STATEMENT OF THE CASE.

This action was brought by a shipper on behalf of a class of shippers for money refunds under certain motor common carrier tariffs involved in Interstate Commerce Commission Docket No. 34971 ("Docket 34971").* The suit was brought against

* Motor common carriers participating in Middlewest Motor Freight Bureau tariffs were subjected to the rate schedules in Docket 34971. The tariffs involved were generally applicable on freight handled from, to, and between points in the "Middlewest territory," an eleven state area.

seventeen named motor common carriers and a class of motor common carriers.*

The Complaint was filed on June 15, 1970. (R. ¶ 1, Ex. A)** On February 25, 1972, the trial court found the action properly maintainable as a class action both as to plaintiffs and as to defendants. Graves was within the definition of the defendant class, as a motor common carrier which transported goods in interstate commerce during the period May 20, 1968 through August 29, 1969, within the region covered by Docket 34971, and which received compensation from shippers therefor. (R. ¶ 2)

On June 18, 1973, the trial court ordered notice sent to members of the defendant class. It provided, inter alia, that any member of the defendant class might request exclusion from the class, pursuant to the provisions of FRCP 23(c)(2). (R. ¶ 4) Graves opted out of the class on October 23, 1973. (R. ¶ 5) Graves was thereafter, on June 21, 1974, served with a summons and complaint. (R. ¶ 6)

On June 20, 1972, prior to the class determination and prior to notice to the class, plaintiff moved for summary judgment on the issue of liability. On November 7, 1972, the trial court issued its order, and on November 21, 1972, its memorandum order, granting summary judgment on the issue of liability and continuing the case on the issue of damages only. (R. ¶ 3)

Graves did not answer or otherwise appear herein. (R. ¶ 7) On or about August 14, 1975, Graves received a copy of a motion for a "default order" together with a proposed order.*** (R. ¶ 8, Ex. B) (App. 5)

* The action has been dismissed as to all of the named defendants and class defendants (those which did not elect to opt-out of the class). The only remaining defendants are those carriers which opted-out of the action and were brought back in by summons and complaint, some of which are in the final stages of settlement and some of which, like Graves, are in default.

** References are to paragraphs in the Agreed Statement as Record on Appeal in the Seventh Circuit and Exhibits thereto.

*** Defendants who were properly before the trial court and who were not in default attempted to object to the default procedure

(Footnote continued on next page.)

The proposed order provided that shippers should file refund claims with counsel for plaintiff-respondent and that upon application by counsel the clerk of court should enter a default judgment in the amount claimed, together with interest and a percentage figure for attorneys' fees.

Graves received no notice of the actual entry of the proposed order, which occurred on September 10, 1975, no notice of any claims filed pursuant to the order, and no notice of any judgments entered by the clerk pursuant to the order. (R. ¶ 8) Graves' first notice of claims or judgments against it was notification by Sears, Roebuck & Co. ("Sears") that Sears had received a garnishment summons and would withhold funds due and owing Graves.

In fact, a default judgment was entered on November 5, 1975, by the clerk of the trial court on behalf of Volume Shoe Company against Graves in the amount of $2,720.83, and against Graves and in favor of counsel for the plaintiff-respondent, in the amount of $906.94. (R. ¶ 11, Ex. C) A garnishment summons to enforce the November 5, 1975 judgment in favor of Volume Shoe Company was served upon Sears in May of 1976. (R. ¶ 12, Ex. D)

Upon notice by Sears, the garnishee, to Graves of the issuance of a garnishment summons, Graves moved to quash the garnishment summons and to vacate the underlying default judgment. (R. ¶ 13, Ex. E) The court, Judge William J. Lynch presiding, on May 21, 1976, set a briefing schedule on Graves' motion and ordered the garnishee, Sears, to pay to the clerk of the court the sum of $2,724.07. That sum of money was paid to the clerk of court. (R. ¶ 14)

By the time the briefing was complete on Graves' motion to quash the garnishment summons and to vacate the default

(Footnote continued from preceding page.)
proposed by plaintiff-respondent. They were informed by the court that they had no standing to do so. The court stated that such a challenge would have to be made by a defaulted carrier. Graves is the first defaulted carrier in a position to object to the default procedure. (R. ¶ 9)

judgment, Judge William J. Lynch had, unfortunately, passed away, and the motion was heard by the Honorable Alfred Y. Kirkland. On May 12, 1977, Judge Kirkland entered a minute order, memorandum opinion and order, denying Graves' motion to vacate the default judgment, and staying garnishment proceedings pending final determination of all matters in the case. (R. ¶ 15, Ex. F) (App. 3)*

Judge Kirkland did not rule on Graves' contention that the default judgment was void because its entry violated Graves' right to due process of law, finding that "This Court is reluctant to review the actions of another judge of this Court. . . ." The court denied Graves' contention that the default judgment was entered in violation of FRCP 54(c) requiring that a default judgment be entered only for the relief prayed for in the demand for judgment in the Complaint, and denied Graves' contention that the default judgment violated FRCP 55(b)(1) and (2) in that the judgment is not for a sum certain which may be entered by the clerk, but for an unliquidated amount, and is of a nature which requires the trial court to determine the amount of damage.**

Thereafter, on October 20, 1977 an order was entered adding the necessary findings to permit a petition for permission to appeal under 28 U. S. C. § 1292(b). (R. ¶ 16, Ex. G) (App. 4) On October 27, 1977 Graves filed a petition for leave to appeal. (R. ¶ 17, Ex. H) On November 18, 1977, the Seventh Circuit Court of Appeals granted Graves' petition for permission to appeal. (R. ¶ 18, Ex. I)

* This and every other default against any defendant in default is not a final judgment as the appropriate findings pursuant to FRCP 54(b) were not made.

** The trial court agreed that the judgment was for an unliquidated amount, but found that the fact that the court ordered the clerk to enter judgment in whatever amount plaintiff-respondent submitted (plus an arbitrary percentage figure for attorneys' fees) was a sufficient judicial scrutiny to satisfy the provisions of FRCP 55(b)(2).

On April 18, 1978, the Court of Appeals for the Seventh Circuit affirmed the trial court's orders. The basis for the affirmance was that Graves had actual notice that plaintiff-respondent requested entry of an order providing a formula by which default judgments or orders might be entered. The court felt that Graves should have contested the proposed procedure at that point. The court was also impressed with the fact that in this particular case, this prototype default judgment was not inaccurate in amount. Finally, the court seems to find the amount of the judgment calculable and thus properly entered by the clerk pursuant to FRCP 55(b)(1). (App. 2, pp. 9-10)

REASONS FOR GRANTING THE WRIT.

The Decision Below Has Decided Important Questions of Federal Law Which Have Not, But Should Be, Settled by This Court.

The decision below raises several questions of federal law which are of constitutional and procedural importance and which are or will be significant, recurring problems. They are:

1. To what extent does a defendant have the right to default on the issue of liability where there is an open-ended complaint as to relief claimed, and still be heard, as a matter of due process of law, on the question of damages and the jurisdictional validity of the underlying default?

2. What is the interrelation of FRCP 8(a), 5(a) and 54(c) in the entry of default orders or judgments and may the provisions of all three Rules be ignored where a defendant in default has notice of a different but non-complying procedure to be followed in entering default orders or judgment?

3. When is the statute of limitations tolled as to defendants in a defendant class action?

A Defendant Has the Right to Default on the Issue of Liability Where There Is an Open-Ended Complaint as to Relief Claimed, and Still Be Heard, as a Matter of Due Process of Law, on the Question of Damages and the Jurisdictional Validity of the Underlying Default.

Default is a course of conduct a defendant may consciously determine to take, and has the right to take. *Bass* v. *Hoagland*, 172 F. 2d 205 (5th Cir. 1949); *United States* v. *Fong*, 182 F. Supp. 446 (N. D. Cal. 1959), *aff'd*, 300 F. 2d 400 (9th Cir. 1962), *cert. denied*, 370 U. S. 938 (1962). Here the complaint served upon Graves prayed in relevant part:

> f. For judgment against all of the defendants herein in an amount to be determined by this court, together with interest, attorneys fees and costs of suit.

When Graves was served with the complaint in June of 1974, it determined that there was no purpose in appearing in the action. Judgment on the issue of liability had long been ordered by the trial court and affirmed by the Seventh Circuit. *Appleton Electric Company* v. *Advance-United Expressways*, 494 F. 2d 126 (7th Cir. 1974). There was nothing in the action to contest. The complaint prayed for no specific damages against Graves. Graves, in defaulting on liability, had every reason to expect on defaulting that it would still be heard on any jurisdictional issues, including a jurisdictional statute of limitations, and on the question of damages. At the very least Graves could expect that an amended complaint or pleading would be served upon it if and when plaintiff-respondent determined to assert specific claims for damages against Graves.

This Court has taken a strong position on the question of deprivation of property without due process of law, which means both notice and hearing prior to deprivation of property. *North Georgia Finishing, Inc.* v. *Di-Chem, Inc.*, 419 U. S. 601 (1975); *Fuentes* v. *Shevin*, 407 U. S. 67 (1972); *Sniadach* v. *Family Finance Corp.*, 395 U. S. 337 (1969).

The trial court did not reach the question of due process, because of reluctance to review the actions of another judge of that court. The Seventh Circuit rejected the due process argument, finding that actual notice of a *proposed* procedure for entry of a default order was sufficient. The Seventh Circuit thought that Graves must have appeared at that point to challenge the proposal. However, if Graves had appeared at that point in the litigation, it would have had to appear generally and would have been subject to the jurisdiction of the court for all purposes. Graves could have been forced to incur all of the expenses of hiring counsel, appearing in a foreign state and engaging in legal proceedings that it was attempting to avoid by defaulting in the first place, and all without knowing how much was at stake.

Graves received no notice of anything after notice of the proposed default order. It did not receive notice of entry of that order. It did not receive notice of the filing of any claims, the taking of any judgment, or of anything else up until its customer, Sears Roebuck & Company, received a garnishment summons. Graves promptly moved to quash the garnishment summons and vacate the underlying default.

This Court has not decided the extent to which the due process clause requires notice and the right to be heard in a default case in which no specific amount of damages is claimed. This Court has not decided whether a defendant, in order to gain the right to be heard on the question of damages or jurisdictional issues, must give up the right consciously to determine to default where the plaintiff has not set forth "the stakes" or specific amounts claimed. This is a significant constitutional and procedural question which must occur with some frequency as there are many cases in which it is not possible at the beginning of litigation to set forth damages with certainty, particularly in a class action context as here. And the question of procedure on default will become far more common with the increased use of defendant class actions, with defendants slung out among the states.

Entry of the Default Judgment Herein Is in Blatant Violation of the Federal Rules of Civil Procedure, and Is Therefore Void or Voidable and Should Have Been Vacated.

FRCP 54(c) requires that:

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. . . .

Obviously a money judgment in any amount exceeds the prayer for relief in the complaint herein. The FRCP 54(c) stricture is supported by two other provisions of the federal rules. FRCP (8)(a) requires that a complaint must contain "a demand for judgment for the relief to which he [the pleader] deems himself entitled". FRCP 5(a) specifically covers the situation. It provides:

> No service need be made on parties in default for failure to appear except that *pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.* (Emphasis added.)

In the one case directly addressing this issue, *Bowles* v. *Fode*, 8 F. R. Serv. 8a.52, Case 1 (D. N. D. 1945), the prayer for relief asked "that the plaintiff recover for and on behalf of the United States against the defendant three times the amount by which the price or consideration received by the defendants on the sales referred to exceeded the applicable maximum price fixed by the regulation." The action was one for treble damages under the Emergency Price Control Act. The court stated:

> In the event of defendants' failure to plead or otherwise defend, I cannot see how plaintiff could obtain a money judgment by default. That portion of Rule 54c underlined above specifically provides that a default judgment shall not exceed the amount prayed for in the demand for judgment. The demand for judgment herein is indefinite. It is not susceptible of ascertainment. At one and the same time plaintiff demands nothing and everything. The prayer

> asks that plaintiff recover three times the amount of the overcharges on an unknown number of sales, and nowhere is there any allegation as to the amount of such overcharges. The overcharges could amount to ten dollars or ten thousand dollars. Certainly, Rule 54c . . . would prohibit entry of a default judgment for any amount because any amount would exceed that demanded in the complaint. 8 F. R. Serv. 8a. 52, Case 1 at p. 92.

Since there was (1) no specific demand for relief as required by FRCP 8(a), and (2) no service of an amended pleading as required by FRCP 5(a), 6 Moore's *Fed. Prac.* ¶ 54.61, p. 1231; 10 Wright & Miller, *Fed. Prac. & Proc.*, § 2683, pp. 258-259, there can be no valid default order or judgment. This Court has never considered the interaction of these Rules and their application to a default situation such as the instant one.

The Seventh Circuit completely ignored the effect of Rules 8(a), 5(a) and 54(c). It apparently believed that actual notice of a non-complying procedure for proving claims and entry of default orders obviated the need for compliance with the Federal Rules of Civil Procedure. There is no authority for failing fully to observe the carefully drawn provisions of the Rules. This Court must uphold the procedural supremacy of the Rules.

---

* Graves contends that the above errors completely dispose of the issues in the case. The Seventh Circuit seemed to assume, however, contrary to the trial court, that once Rules 8(a), 5(a) and 54(c) were ignored, judgment could be entered for a "liquidated" amount pursuant to FRCP 55(b)(1) and (2).

That is not so. The damages were not such a ministerial calculation that plaintiff's burden of proof could be satisfied merely by entry of judgment by the clerk pursuant to 55(b)(1), without review of the claims by any person—not the court, not plaintiff's counsel, not the clerk, and certainly not any defendant. The amounts of claims cannot accurately be determined by a single multiplier figure as would appear on the claim forms which plaintiff was using to enter default judgments. Some rate increases were rescinded and some were increased during the period of time for which refunds were being claimed. Apart from the fact that the amounts of claims were not ministerially calculable, clearly a percentage amount, 33⅓ per cent for attorneys fees, is not a liquidated amount or sum certain which may be entered by the clerk. No hearing was held as to attorney's fees, though the court entering the proposed default order specifically

(Footnote continued on next page.)

The Application of the Statute of Limitations to Defendants in a Defendant Class Context Has Never Been Determined by This Court.

The statute of limitations applicable to this case is the one year statute of limitations contained in the Interstate Commerce Act, 49 U. S. C. § 16(3)(f). That statute is jurisdictional and cannot be waived. *Midstate Horticultural Co.* v. *Pennsylvania R.R.*, 320 U. S. 356 (1943); *Wisconsin Bridge & Iron Co.* v. *Illinois Terminal Co.*, 88 F. 2d 459 (7th Cir. 1937); *Carothers* v. *Western Transportation Co.*, 412 F. Supp. 1158 (S. D. Ill. 1976). Therefore, even though defendant is in default and not entitled to contest liability, if the statute is jurisdictional and if it has run as to the defendant Graves, then the underlying default judgment is void.

In fact, the statute of limitations has run as to defendant Graves. The suit was filed on June 15, 1970. Graves had no official notice of the pendency of the suit until more than 3 years later, or August of 1973. On that date it received a copy of the notice to the defendant class pursuant to a trial court order entered in June of 1973.

At the time of receipt of official notice of the *Appleton* litigation in August, 1973, the law in the Seventh Circuit on the statute of limitations was contained in *Bela Seating Co.* v. *Advance Transportation Co.*, 344 F. Supp. 854 (N. D. Ill. 1972), under which the statute of limitations would already have run. Shortly after Graves opted out of the class, as it was entitled to do, the Seventh Circuit decided *Container Corporation of America* v. *Admiral Merchants Motor Freight, Inc.*, 489 F. 2d 825 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 1581 (1974).

(Footnote continued from preceding page.)

found in connection with another earlier ruling that the question of attorney's fees requires a hearing. See, *e.g.*, *Davis* v. *National Mortgage Corp.*, 320 F. 2d 90 (2d Cir. 1963); *Thorpe* v. *National City Bank*, 274 F. 200 (5th Cir. 1921). See also *Flaks* v. *Koegel*, 504 F. 2d 702 (2d Cir. 1974).

The *Container* case rejected the *Bela Seating* interpretation of the statute of limitations, but adopted another interpretation under which the statute of limitations would have begun to run on December 27, 1971, and thus would also have expired (on December 27, 1972) long before Graves had any official notice of the pendency of the *Appleton* defendant class action.

The only interpretation of the facts under which the statute of limitations might not have run as to Graves, is that it was tolled from the time the *Appleton* lawsuit was filed in June of 1970 until the date Graves opted out, which was October 23, 1972. The statute then ran from October 23 until June 21, 1974 when Graves was served with process. Under this interpretation there would still have been, on the date of service, approximately 4 months left to the statute. For both legal and equitable reasons, however, this interpretation of tolling in a defendant class action context should not be adopted.

First is the obvious problem of laches. While this suit was filed in June of 1970, and while Rule 23 requires that a court shall determine an action may maintained as a class action "as soon as practicable after the commencement of an action", that was not done in this case. The class action was not certified until over a year and one half after the action was filed, and notice was not ordered sent to members of the defendant class for more than a year after that. There were no difficulties in identifying members of the proposed defendant class as they were all listed with the Interstate Commerce Commission.

As a legal matter, there is some authority contrary to Graves' position with regard to a class action tolling the statute of limitations. Graves contends, however, that viewed in the light of the inherent differences between a plaintiff class and a defendant class, these seemingly contrary authorities support its position. In *American Pipe & Construction Co.* v. *Utah*, 414 U. S. 538 (1974), this Court stated:

> [T]here remain no conceptual or practical obstacles in the path of holding that the filing of a timely class action com-

> plaint commences the action for all members of the class *as subsequently determined*. (Emphasis added.) 414 U. S. at 550.

Graves was not in the class as subsequently determined as it opted out and therefore could not have been bound. And in 3B Moore's, *Fed. Prac.*, ¶ 23.90[3], p. 1652 it is said that:

> [W]here the action is instituted on behalf of all members of the class, and the court determines under [Rule 23](c)(1) that the suit may maintained as a (b)(3) class action, and continues it as such, then, *except as to those opting out*, the statute is tolled as to the class when the suit is started. . . . (Emphasis added.)

In *American Pipe* and in Moore's the question was whether persons who would have been in a class had it been certified, had the right thereafter to intervene as plaintiffs when it was determined that the case would not proceed as a class action. This makes excellent sense, since these parties may have been relying on the pendency of a class action to protect their rights. As to those who opted out, there would be no application of a tolling doctrine to permit them to bring a second suit. The statute would have run as to those parties. The statute of limitations ought not to be tolled for a defendant in a class action where individual forms of relief are sought against defendant class members, *i.e.* damages, until the defendant, whether named or unnamed, is actually served with process as required by both the federal rules and by the due process clause.

> It is elementary that one is not bound by a judgment *in personam* resulting from litigation in which he is not designated as a party or to which he is not made a party *by service of process*. (Emphasis added.) *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 395 U. S. 100, 110 (1969).

See also *Christopher* v. *Brusselback*, 302 U. S. 500 (1938) (Ohio shareholders not bound by judgment in class action in Illinois when they were not served with process); *Employers Reinsurance Corp.* v. *Bryant*, 299 U. S. 374 (1937) (court was

without jurisdiction where defendant was served in different district).

In *Chevalier* v. *Baird Savings Ass'n*, 72 F. R. D. 140 (E. D. Pa. 1976), the initial complaint named a class of defendants. The defendant class was not certified. In deciding when the statute of limitations was tolled for plaintiff-mortgagors, the court held that the statute was not tolled until the particular defendant was named and served in the second (and the third) amended complaint.

> Otherwise, defendants would be required to defend against actions of which they had no knowledge whatsoever until after the statute of limitations had run. 72 F.R.D. at 155.

And, in an explanatory note, the court stated:

> Nor do we think this conclusion is affected by the fact that the initial complaint purported to sue a class of defendants. It is not until a class is certified and notice sent that members are expected to be aware of the action or exercise any of the attendant rights or duties. Cf. *American Pipe*, supra, 414 U.S. at 552. 72 F.R.D. at 155, note 45.

See also *Hellerstein* v. *Mather*, 360 F. Supp. 473 (D. Colo. 1973), in which the Court held that the statute of limitations was tolled by the filing of a class action in favor of members of the plaintiff class and against defendants named in the action, but was not tolled against defendants who were not named.

That the statute of limitations was not tolled against unnamed defendants with no notice is in part supported by the Seventh Circuit's decision in *Container Corporation of America* v. *Admiral Merchants Motor Freight, Inc.*, 489 F. 2d 825 (1973). In that opinion, the court noted that counsel for the plaintiffs on oral argument had suggested that they did not have a statute of limitations problem in *Container* because the statute was tolled by the earlier filing of the *Appleton* class suit in June of 1970. The court responded to that argument as follows:

> We think that none of those arguments offers the most reasonable interpretation of the statute in the circumstances

> of this case. In our opinion the "date of the order" within the meaning of § 16(3)(f) [of the Interstate Commerce Act] is the date on which the litigation prosecuted by the carriers to obtain judicial review of the Commission's order was completed. 489 F.2d at 827-28.

The statute of limitations in this case began to run on December 27, 1971, and was not tolled by the mere filing of the *Appleton* action. It would not be tolled until either (1) an unnamed defendant was actually served pursuant to Rule 4, or (2) the class was certified and notice sent. This is required as a matter of due process, on equitable grounds, and because to hold otherwise in the context of a defendant class as opposed to a plaintiff class, would ignore all of the reasons for a statute of limitations.

Prior to service, or certification and notice, an unnamed defendant would have no knowledge, perhaps until long after a statute of limitations had run, that it was a party to litigation in which some form of relief against that defendant individually was sought. The policy behind a statute of limitations is to prevent stale claims and to provide that claims must be brought within such a period of time that the other party is able to protect itself. Here, unnamed defendants in the position of Graves had no official notice of potential liability prior to the time the statute should have run. They were unable to protect themselves (a) by retaining documents; (b) by keeping track of witnesses; or (3) by setting aside funds so that the potential liabilities could be financially prepared for, and not prove a major disruption of business or a step on the way to bankruptcy.

The consequences flowing from potential liability, are quite serious, particularly in this type of class action where the potential claimants may have an aggregate of small claims, but the potential liability for a defendant may be staggering. Not only is the defendant without notice at a serious disadvantage where it either has not prepared for litigation, or may have, thinking the statute had long run, affirmatively destroyed documents and

other records which it no longer needed, but also innocent third persons may suffer. The effects on investors or stockholders of unknown liabilities may be quite substantial. If Graves' argument about the statute of limitations is not eventually upheld, any corporation may be subejct to huge unknown liabilities. The very possibility of liabilities of that magnitude which cannot be protected against may have an unsettling effect on the economics of doing business in this country.

The Decision Below Has So Far Sanctioned a Departure from the Accepted and Usual Course of Judicial Proceedings by a Lower Court, as to Call for an Exercise of This Court's Power of Supervision.

This Court has prime responsibility for questions of federal practice and procedure. *E.g., Hickman* v. *Taylor,* 329 U. S. 495 (19.....). The trial court, as affirmed by the Court of Appeals for the Seventh Circuit, has so far departed from the accepted and usual application of Federal Rules of Civil Procedure 8(a), 5(a) and 54(c) as to call for the exercise of this Court's supervisory powers. See the discussion *supra.* These rules have been ignored or superseded by a more expeditious manner of proceeding. Allowing practical results to take precedence over the Federal Rules of Civil Procedure, particularly in complex class litigation, will lead only to confusion and increased litigation and complexity.

In this case alone, to sanction the procedure employed in the trial court will unduly complicate matters. Graves is only one of almost 180 carriers in default against each of whom there will be many such default claims. Under the trial court's default order shippers filed claims with plaintiff-respondent's counsel. Plaintiff-respondent's counsel is under no duty, even if qualified, to review the claims for their accuracy, to review the claims for their evidentiary backing (paid freight bills or other appropriate evidence), or even to review the claims for propriety of form (*i.e.* are they verified and sworn). Plaintiff-respondent's counsel

merely takes whatever a shipper sends and files it with the clerk of court who enters judgment upon it. Neither plaintiff-respondent's counsel nor the trial court review what is filed, nor review the judgment. Graves has no notice of the entry of the judgment until its property is confiscated under an enforcement of judgment procedure.

Although it is conceded that this prototype claim is accurate, many of the default claims are quite likely not to be accurate. The likelihood of inaccuracy has never been contested below. The determination of the amount and accuracy of claims is not a simple, easily performed procedure. While refunds due to shippers under Docket 34971 are theoretically mathematically calculable, that calculation involves a highly complex analysis which can be performed only by competent, trained, experienced rate-clerks.* Testimony was offered at a hearing as to the effort required to determine whether a refund was due under Docket 34971, or, if due, in what amount. (Joint Appendix from Appeal 73-1665, Tr. 139-48, 253-260) It was estimated that the amount of resource material which would be required by a rate-clerk examining bills to make such a determination would occupy 12 to 18 feet on a bookshelf.

The difficulties involved in the calculation include:

1. Carriers ship under interstate and/or intrastate tariffs other than those published by the Middlewest Motor Freight Bureau;

2. Not all of the Middlewest tariffs were involved in Docket 34971;

3. None of the tariffs that were involved in that Docket applied to all points in a geographic area and many specific points were excepted from the normal application of the tariffs. In addition, some shipments between points involved were covered by statutory and other exemptions;

* This is not a concession that the "formula" suggested by plaintiff-respondent on its claim forms attached to the proposed default order (R. ¶ 8, Ex. B) is sufficient.

4. Intrastate movements were not included in Docket 34971; and

5. Some increases were rescinded, and some rates were further increased during the period of time for which refunds are being claimed in this proceeding.

Thus many default orders entered without notice and review will be inaccurate.

As soon as the judgment below is final, plaintiff's counsel will attempt to enforce hundreds of judgments against the almost 180 carriers in default. Each inaccurate claim will have a motion to quash until the validity of the procedure is determined. Many third parties—garnishees—will be caused expense and inconvenience. All of this time and inconvenience could be avoided had the trial court followed the Federal Rules. This Court should exercise its supervisory authority.

The alternative following the Federal Rules of Civil Procedure is so simple. Plaintiff-respondent need file only one form of proposed judgment against each carrier in default, listing the claims and amounts to be defaulted. It would be served in the same manner as a summons. The proposed judgment would set a date for a hearing and an earlier date to file notice that the carrier intended to appear and contest. At that point the carrier could either default and judgment be taken, or contest—as it is entitled under the Rules and due process clause.

CONCLUSION.

This Court should grant petitioner's Writ of Certiorari to the Seventh Circuit Court of Appeals.

Respectfully submitted,

MARTHA M. JENKINS,
77 West Washington Street,
Chicago, Illinois 60602,
Counsel for Petitioner.

July 17, 1978.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued April 17, 1978

18 April, 1978

Before

HON. LUTHER M. SWYGERT, *Circuit Judge*
HON. LEONARD P. MOORE, *Senior Circuit Judge**
HON. ROBERT A. SPRECHER, *Circuit Judge*

APPLETON ELECTRIC COMPANY,
Plaintiff-Appellee,

No. 77-2155 vs.

GRAVES TRUCK LINES, INC.
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

No. 70 C 1427

Alfred Y. Kirkland, Judge.

ORDER

After reading the briefs and hearing oral argument by counsel for the parties in this cause, the panel rendered its decision from the bench. For the reasons articulated by the panel, the judgment of the district court is affirmed.

* The Honorable Leonard P. Moore, United States Senior Circuit Judge for the United States Court of Appeals for the Second Circuit, is sitting by designation.

APPENDIX 1

U. S. COURT OF APPEALS

Seventh Circuit—Docket

APPLETON ELECTRIC COMPANY,
Plaintiff-Appellee,

vs.

GRAVES TRUCK LINE, INC.,
Defendant-Appellant.

No. 77-2155

REPORT OF PROCEEDINGS before the Honorable Judges Swygert, Moore and Sprecher, on the 4th day of April, A.D., 1978.

Present:

Mr. Jay A. Canel
30 North LaSalle Street
Chicago, Illinois 60602
appeared on behalf of appellee;

Ms. Martha M. Jenkins
77 West Washington Street
Chicago, Illinois 60602
appeared on behalf of appellant.

[2] Judge Swygert: Let me see—Ms. Jenkins, we read these briefs, so we know a little bit about the case, I guess.

Your adversary said, well, you had two opportunities to get into this case and you didn't do anything until you found out that you were defaulted and that you had that judgment against you, a garnishment. Why didn't, when you had that summons, why didn't you appear? Any reason?

Ms. Jenkins: Your Honor, Martha Jenkins, I represent the defendant-appellant, Graves Truck Line. Our argument, of

APPENDIX 2

course, is based on the premise that a defendant is entitled to default, and I think there can't be any argument.

Judge Swygert: You mean under the Rules?

Ms. Jenkins: Under the Rules.

Judge Swygert: Well, all right, but Judge Lynch wrote the order which would indicate that he formulated—he devised a formula for this very purpose of default, as I understand the argument.

Ms. Jenkins: The defendant, Graves, was in default. He has been served—it has been served with a summons and complaint. It was in default.

The plaintiff, ex-parte, proposed that procedure [3] to the Court. The other defendants, who were before the Court asked to oppose that procedure. They were told that they lacked standing to do so and that that could only be done by a carrier in default at such time that that carrier was before the Court.

I do not think Graves was under any obligation at that point to appear and challenge the proposed procedure by plaintiff.

Judge Swygert: He did have notice of it?

Ms. Jenkins: He did have actual notice that the procedure was actually proposed, although he never did get any notice after that, and what the Court did with that procedure was to enter it without opposition.

Judge Swygert: Don't you think that if I get down a prospective defendant, of course, and for some liability, and it has been decided there is a liability, and I get a notice that it is going to —that I'm going—there is going to be a method of computation for the damages, that I better—if I don't like it, I better get over to the courthouse and protest.

Don't you think there was an obligation on Graves to do that?

Ms. Jenkins: No, I don't think so, Your Honor. I think that goes directly—There are four possible results [4] I think this Court could reach, favorable to my client. I think Mr. Canel will suggest the ones unfavorable.

The first and easiest result is that the judgment should be vacated under Rule 60(b)4 on the grounds that it is void because it is in violation of Rule 54(c), 8(a)(3) and 5(a) and 54(c) says that a judgment may not be taken against the defendant in default or otherwise—in default which is different in kind or which exceeds in amount that which is in the prayer for relief in the Complaint.

The prayer for relief in this Complaint simply says that —asked for a judgment against all defendants herein in an amount to be determined by this Court together with interest, attorneys' fees and costs of suit. Rule 8(a)(3) requires that the Complaint set forth a demand for the relief to which the pleader deems himself entitled.

Rule 5(a) specifically addresses the problem before the Court in this case, and it says that pleadings asserting new or additional claims against parties in default—and clearly this is a new or additional claim—once the plaintiff has come up with a specific money amount—

Judge .....: This is a pretty old Complaint; this was a question of a refund that your client should have made years ago.

[5] Ms. Jenkins: That's true.

Judge .....: What's the big question about damages. There is no question about what the damages are.

Ms. Jenkins: There certainly is a question. The Complaint doesn't ask for any specific amount.

Judge .....: You could have figured it out and sent the money without a lawsuit.

Ms. Jenkins: Well, that's one of the reasons there is a lawsuit, Your Honor. I admit this has been a long, complicated suit. This is the last disputed issue before any court in this suit. I think it violates due process for the plaintiff to take this judgment following this procedure. I'm not saying the plaintiff can't or shouldn't have a judgment for the amounts to which his

shippers are entitled. All I'm saying is that the way it has been gone about, it violates the Rules and it violates due process.

If the plaintiff goes before The Court, and let me explain what the plaintiff now has. The plaintiff sent out a notice at an earlier point in this litigation soliciting any of the complaints that any of the shippers might have against any of the 1,400 defendants in this case; this would include Graves and all of the other defendants in default.

[6] The plaintiff now has in his possession all of the complaints by shippers against the various defendants in default. All I'm suggesting is that the way the plaintiff should have gone about collecting those amounts is to go before the Court and serve some sort of amendment on each carrier in default saying these are the amounts of claims against you, I'm going to take a judgment, and that's required by Rule 5(a), I believe, as well as by the due process clause of the 14th Amendment; and at that point, Mr. Canel can take his judgment by default, the plaintiff—defendant, excuse me, in this case, Graves, would have notice of exactly what the plaintiff is claiming. If he chooses to come in and contest that amount including interest and attorney's fees, that's fine. That's the defendant's option at that point, but at least he knows what is happening to him.

Judge Swygert: Is there any doubt that this computation is not correct and that you got stuck for more money than you should be paying?

Ms. Jenkins: This particular computation?

Judge Swygert: Yes.

Ms. Jenkins: This is only one claim.

Judge Swygert: Well, whatever, whatever we are talking about, is there a mistake in the computation?

[7] Ms. Jenkins: I don't believe there is a mistake in this particular claim. I do believe—

Judge Swygert: That's the only one we are talking about, isn't it?

Ms. Jenkins: Yes.

Judge Swygert: I'm not talking if there are other claims; that's another lawsuit, another date, isn't it?

In this claim, what I'm asking you, is there any case that the amount that you got fined was—the judgment against you was in any amount in excess of what you actually owed by reason of a rate problem?

Ms. Jenkins: This claim, an amount something over $2,000, I do not believe to contain any inaccuracies; however, this is only one of many claims which Mr. Canel may have against Graves.

Graves is estimating there may be as many as twenty-five to thirty thousand dollars in claims against it. It does not know how many of those claims Mr. Canel actually has. He could come back with all the rest of the claims. There may very well be, for reasons I think I stated in some detail in my briefs at Pages 11 through 13 in the original brief and Page 5 of the reply brief, a great many inaccuracies.

All the prior history of this litigation in [8] terms of claims that were filed by shippers indicate that that will happen.

Judge Swygert: Have there been defaults against you on those?

Ms. Jenkins: He hasn't taken them yet, but—

Judge Swygert: Why don't you get in there and try to work it out with him. It seems to me you can head that off in a hurry, if there are any inaccuracies.

Ms. Jenkins: We are not entitled—the way this procedure has been going about, we will never know that this claim is there until there has been a garnishment or other enforcement of judgment proceeding. We don't have any notice of the judgments or the claims or anything until the plaintiff pursues one of the methods provided by the Rules for enforcing the judgment.

Judge Sprecher: Don't you have to meet the requirements to overlook a default judgment to show that there is a meritorious defense and that there is a gross inaccuracy in this amount. Now if you concede that the amount is correct, what remains for you as the basis to ask the Court's indulgence to open up to default?

Ms. Jenkins: Your Honor, we are talking about one claim which is going to be the first of a large number of claims both against this defendant and other defendants [9] in default. We are talking about the procedure—

Judge Sprecher: As Judge Swygert says, that's both in futuro and not before us.

Ms. Jenkins: We are talking about the procedure by which the plaintiff is going to do this. I think it would be best to resolve the validity of the procedure at this point, so that we don't come running up with every claim to this Court or to the trial Court raising the same arguments.

Judge Swygert: Suppose we agree with you that it would have been better to send these questions and claims to a special master or magistrate? That's not before us.

Ms. Jenkins: We are talking about Graves' right to notice and the opportunity to be heard.

Judge Swygert: You had two opportunities, didn't you have two opportunities, at least?

Ms. Jenkins: Under the Rules, I think Graves was entitled to service of a specific amount demanded by plaintiff under Rule 5 (a). I also think that that's true as a Constitutional matter.

We are talking about a void judgment, Rule 60 (b) 4, which I don't believe requires a showing of meritorious defense. If a showing of meritorious defense were required, I think that I have suggested in my [10] reply brief, and I'm embarrassed because we didn't suggest it in more detail earlier that we do have a meritorious defense in the Statute of Limitations and that this is the jurisdictional statute—

Judge Sprecher: Well, that goes to the merits. You are here before us quibbling—or not quibbling, but saying that you haven't had due process because there was no opportunity for you to defend against the specific amount of the claim.

Judge Swygert: That limitation question—You got a summons, didn't you?

Ms. Jenkins: Sure.

Judge Swygert: You didn't do anything about it, right?

Ms. Jenkins: Correct.

Judge Swygert: Then you got an order, then you got notice that even after you had been defaulted, how the default was going to be—the mechancis of computation, right?

Ms. Jenkins: That's correct.

Judge Swygert: Did you do anything—You didn't do anything about that. Now today you are saying there was a defense of limitations. There used to be a theory or proposition that that's an affirmative defense and [11] you have got to raise it, and you can't raise it, it seems to me, at this late date.

Ms. Jenkins: That would be true if it were a procedural statute of limitations. I don't think it's true with a jurisdictional statute.

In any event, there is not only the question of the amount of this claim, in terms of the amount of the refund, but there is also a question of attorney's fees as to which there was no hearing held.

Judge Swygert: Wasn't that in this formula?

Ms. Jenkins: That was an arbitrary figure set by the plaintiff and approved by the Court.

Judge Swygert: I know, but you didn't quite answer me. Was it in the formula that you got?

Ms. Jenkins: Yes.

Judge Swygert: It was.

Ms. Jenkins: Besides my argument that the entry of judgment in a specific amount here which is not prayed for violates Rules 54, 8 and 5, we make the additional argument that the entry of this judgment violates Rule 55 (b) (1) and (2). In that, under one, this amount could not have been entered by the clerk because the party was in default; and under (b)(2), it was not sufficient scrutiny by the Court merely to approve [12] an ex parte formula suggested by plaintiff to have very complicated claims filed, which would not be reviewed by the plaintiff or anybody as to their accuracy, whether they were sworn and verified, whether they were supported by paid freight bills or other appropriate evidence whatever that might be, or in any other way for their accuracy. To determine the accuracy of these claims, that would take a qualified rate clerk.

If Your Honor has no other questions, I would like to save the rest of my time for rebuttal.

(Off record discussion)

Judge Swygert: We have consulted among ourselves and come to the conclusion that the judgment should—that this judgment should be affirmed. I am going to say a little bit about it, and then I'll let Judge Sprecher and Judge Moore say what they think, if they want to say anything in addition.

First, the defendant here got summons and this case was in existence; they knew it ahead of time, I think, but in any event, they got a specific summons, as I understand the record, and then Graves also got a notice that anyone that hadn't appeared and hadn't defended and was in default, that there was going to be a formula on how these judgments in default—I mean how this [13] default amount would be computed including the percentage of attorney's fees.

Graves deliberately and advisedly ignored that notice. Then there was a finding when there was a garnishment proceeding that—that took place. Then Graves becomes concerned and precipitates these proceedings which we now have under review.

I can't believe that in this case there was any want of process. I think the Rule that was involved here was complied with. It doesn't say that you have to have a liquidated amount. As I understand it, it means that if the Court can compute it, the amount, by computation, that he can then enter a default, and this formula was specific, the amounts were presented, and on concession here the appellant says that there was no—that the amounts were accurate, so it seems to me that there is no other way we could affirm—but affirm, and on the Statute of Limitations question, that seems to me was something that could have been raised, but wasn't; but now it's too late in the day to assert.

There may be some other observations that my brothers would want to make, and so I'll ask Judge Moore if he has anything that he would like to say.

Judge, do you want to say something?

[13A] Judge Moore: I concur.

Judge Swygert: The judgment will be affirmed.

Judge Sprecher: And an order will be entered.

(Which were all the proceedings had in the above-entitled cause on said day.)

[14] STATE OF ILLINOIS }
COUNTY OF COOK } ss.

Joanne M. Jenero certifies that she is the Certified Shorthand Reporter who reported from a tape recording of the proceedings had in the above-entitled cause and that the foregoing is a true and correct transcript of those proceedings.

/s/ JOANNE M. JENERO
C. S. R.

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Alfred Y. Kirkland

Cause No. 70 C 1427 Date May 12, 1977

Title of Cause—Appleton Electric Co. vs. Advance-United Expressways, et al.

Brief Statement of Motion—plaintiffs' motion to vacate, defendant Grave's motion to quash and motion of certain opt-out defts compel

Enter Memorandum Opinion and Order.

Plaintiff's motion to vacate dismissal orders is denied.

Defendant Grave's motion to vacate default judgment is denied. Garnishment proceedings are stayed pending the final determination of all matters in the case.

Defendants' motion to compel plaintiffs to file an affidavit in opposition to defendants' motions to dismiss is granted.

Kirkland, *J.*

May 16, 1977

APPENDIX 3

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

APPLETON ELECTRIC COMPANY, an Illinois corporation, individually and on behalf of all others similarly situated,
Plaintiffs,
vs.
ADVANCE-UNITED EXPRESSWAY, et al.,
Defendants.

No. 70 C 1427

MEMORANDUM OPINION AND ORDER

This matter comes before the Court on three motions: (1) Plaintiffs' Motion to Vacate Dismissal Orders as to Certain Defendants; (2) Defendant Grave's Motion to Quash Garnishment Proceedings and to Vacate Default Judgment; and (3) Motion of Certain Opt-Out Defendants to Compel Plaintiff to File an Affidavit in opposition to Opt-Out Defendants' Motions to Dismiss.

In this action, Plaintiff, individually and on behalf of a class of shippers, sued carriers for refunds under certain motor common carrier tariffs involved in Interstate Commerce Commission Docket No. 34971. Plaintiff and members of the class were given summary judgment on the issue of liability. The procedure for collecting refunds was eventually determined and detailed in a Settlement Agreement. Certain Defendant carriers were dismissed from the case, others were defaulted, and a group of Defendants still remain in the action.

I. PLAINTIFFS' MOTION TO VACATE DISMISSAL ORDERS

Plaintiffs move to vacate the dismissal of seven Defendants, pursuant to Rule 60(b), Federal Rules of Civil Procedure.

Certain Defendants made voluntary payments of claims before the Court ordered that claims be paid only under direction of the Court. The question of attorney's fees attaching to these payments had not been settled when the Court entered dismissal orders as to these seven Defendants. Plaintiffs move to vacate those dismissal orders, claiming that they mistakenly agreed to their entry. Plaintiffs state that they did not intend to agree to dismissal until the question of attorney's fees was resolved and ask that the Court in its discretion grant relief from this mistake.

Rule 60(b)(1) provides relief from final judgment for "mistake, inadvertence, surprise, or excusable neglect." Such relief is extraordinary and may be invoked only upon a showing of exceptional circumstances, *DeVito* v. *Fidelity and Deposit Company of Maryland*, 361 F. 2d 936 (7th Cir. 1966). Ignorance or carelessness are not adequate grounds for relief, *Bershad* v. *McDonough*, 469 F. 2d 1333 (7th Cir. 1972).

This Court finds that Plaintiffs had ample opportunity to discover that all issues as to these Defendants had not been settled before they agreed to the dismissal orders. Despite the complexity of this case and the numerous Defendants, Plaintiffs' oversight amounts to no more than carelessness and cannot be excused. Therefore, Plaintiffs' Motion to Vacate the Dismissal Orders is denied.

II. DEFENDANT GRAVE'S MOTION TO VACATE DEFAULT JUDGMENT AND TO QUASH GARNISHMENT

Defendant Graves moves, pursuant to Rule 60(b), Federal Rules of Civil Procedure, to vacate the default judgment entered against it in favor of Volume Shoe Company, and to quash garnishment.

Graves was served with a Summons and Complaint in this suit but chose not to appear in the action. Consequently, a default order and, later, a default judgment were entered against it. Graves received no notice of the entry of the default order, no notice of any claims filed by shippers, and no notice of the entry of judgment against it. Graves first received notice of judgment when Sears, Roebuck & Company explained that funds owed to Graves would be withheld pursuant to a garnishment summons.

A. *Motion to Vacate Default Judgment*

Defendant Graves makes two arguments in support of its Motion to Vacate Default Judgment: (1) that the amount of damages in this case was not liquidated and therefore the Clerk's entry of judgment violated the hearing requirement of Rule 55(b)(1); and (2) that it was denied due process when it received no notice of the hearing before judgment was entered.

This Court has the power to relieve a defendant of judgment under Rule 60(b)(4) if the judgment is void, or under Rule 60(b)(6) for any other reason justifying relief from judgment. Defendant's arguments go only to the proposition that the judgment is void.

Defendant's first contention on the issue of damages attacks the procedure instituted by Judge Lynch to handle defaulting defendants. The Complaint itself included no specific amount of damages, but instead stated that damages were to be "determined by this Court, together with interest, attorney's fees and costs of suit." On September 10, 1975 Judge Lynch issued an order directing shippers with claims against defaulting defendants to file verified claims with Plaintiffs' attorney. Plaintiffs' attorney could then apply to the Clerk for judgment in favor of each claimant. Damages would include 100% of the verified claim plus 6% interest and 33⅓% for attorney's fees.

Defendant claims that because the amount of damages was not liquidated or capable of ascertainment, judgments entered by the Clerk following the above procedure were invalid. However, it was Judge Lynch who established the formula to be applied in computing the judgment to be entered. The fact that the Judge appointed the Court Clerk to compute the amounts does not diminish the Judge's central role in determination of damages. This Court finds no invalidity in the judgments so entered.

Defendant next attacks Judge Lynch's Order because it did not allow Defendant to participate in determination of damages, thereby denying due process of law. There is no question but that a defaulting defendant has a right to be present at a scheduled prove-up and to contest a plaintiff's assessment of damages, *Flaks* v. *Koegel*, 504 F. 2d 702 (7th Cir. 1974). However, under Rule 55(b)(2) no notice of the hearing need be given to a defendant who has not appeared in the action. See *Gomes* v. *Williams*, 420 F. 2d 1364 (10th Cir. 1970); *Wokan* v. *Alladin International, Inc.*, 485 F. 2d 1232 (3rd Cir. 1973).

In this case, pursuant to Rule 55(b)(2), Graves did not receive notice of the hearing on damages. Graves admits receiving a copy of the Motion for Default Order and a copy of the proposed order. Graves then had ample opportunity to discover what proceedings would follow and to be heard on the question of damages but chose not to be heard. Plaintiffs' attorney met with Judge Lynch and their meeting resulted in the September 10, 1975 Order which established a method of determining damages for defaulting defendants. Rule 55(b)(2) was not violated by Judge Lynch's actions.

The essence of Defendant's argument is that under Rule 55(b)(2), a defaulting defendant is denied due process of law. This Court is reluctant to review the actions of another judge of this Court, *see Barrett* v. *Baylor*, 457 F. 2d 119 (1972); *Peterson* v. *Hopson*, 306 Mass. 597, 29 N. E. 2d 140 (1940), and is especially reluctant where those actions are in accord with the Federal Rules of Civil Procedure. Therefore, Defendant's Motion to Vacate the Default Judgment is denied.

B. *Motion to Quash Garnishment*

Once default judgment was entered against Graves, garnishment proceedings began against Sears, Roebuck & Company to collect monies owed by Sears to Graves. Defendant asks that those proceedings be quashed because they are based on an invalid judgment. Because this Court has found that judgment to be valid, Defendant Graves' Motion to Quash Garnishment Summons on these grounds is also denied.

Defendant next argues that the default judgment is not a final judgment since, under Rule 54(b), a judgment as to one defendant in a case of multiple parties is not a final judgment and cannot be enforced prior to adjudication as to all claims and parties in the action. Rule 54(b) states:

> In the absence of [express determination of finality], any order or other form of decision . . . which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties. . .

Ordinarily, execution may enter only upon a final judgment, *Redding & Company* v. *Russwine Construction Corporation,* 417 F. 2d 721 (D. C. Cir. 1969). The role that Rule 54(b) plays with reference to the finality of a judgment for purposes of appeal has implications as to its finality for purposes of execution as well, 6 *Moore's Federal Practice* ¶ 54.42 (2d ed. 1976). Strict adherence to the certification requirements of Rule 54(b) has been repeatedly stressed. See, e.g., *International Controls Corp.* v. *Vesco,* 535 F. 2d 742 (2nd Cir. 1976).

Without certification as to its finality, Graves' default judgment is not final. Because judgments disposing of all claims and parties have not been entered in this case, this Court orders that garnishment proceedings already begun against Sears be stayed pending final determination of all matters in this case.

III. Motion of Certain Defendants to Compel Plainitffs to File an Affidavit in Opposition to Motions to Dismiss

The Settlement Agreement permits a defendant who has paid all claims pursuant to the Settlement Agreement to move for dismissal from the action. Defendants now ask the Court to compel Plaintiffs' attorney to verify allegedly outstanding claims by checking with each Plaintiff shipper before objecting to Defendants' Motion to Dismiss.

Presently a Defendant seeking dismissal submits an affidavit that it has complied with the Settlement Agreement and has paid all valid claims. Plaintiffs' attorney then provides Defendant's counsel with a list of claims which Plaintiffs' attorney contends are outstanding. Each Defendant carrier must then check its records as to the status of those unpaid claims.

Defendants here argue that the lists provided by Plaintiffs' attorney are grossly inaccurate and that the time spent verifying Plaintiffs' allegations is needlessly wasted. Defendants further argue that if Plaintiffs' attorney was required to check its records with those of the Plaintiff shippers, only arguably valid claims would need to be checked. Plaintiffs' attorney responds that the reason for the resulting hardship to Defendants is that Defendants have failed to file written answers to each verified claim as required by Paragraph 6 of the Settlement Agreement.

Although the Settlement Agreement requires that Plaintiffs submit a list of unpaid claims to each Defendant who moves to be dismissed from the action, the Agreement is silent as to the amount of investigation Plaintiffs' attorney must do to verify that list. The Court agrees with Defendants that the entire burden for updating lists of claimants should not rest with them. Therefore, the Court grants Defendants' Motion to Compel and orders Plaintiffs to file an affidavit from each shipper who maintains it still has a valid but unpaid claim *before* objecting to Defendants' Motion to Dismiss.

In granting Defendants' Motion, the Court *recognizes that both sides contributed to these problems.* Therefore, this Court further orders Defendants to adhere strictly to the Settlement Agreement with regard to production of written responses to each verified claim. A copy of each written response and proof of service on each claimant must be served on attorneys for the Plaintiff class prior to each Defendant's Motion to Dismiss.

CONCLUSION

Plaintiffs' Motion to Vacate Dismissal Orders is denied.

Defendant Graves' Motion to Vacate Default Judgment is denied. Garnishment proceedings are stayed pending the final determination of all matters in the case.

Defendants' Motion to Compel Plaintiffs to File an Affidavit in Opposition to Defendants' Motions to Dismiss is granted.

Enter: /s/ ALFRED Y. KIRKLAND
Alfred Y. Kirkland,
Judge

Dated: May 12, 1977

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

Name of Presiding Judge, Honorable Alfred Kirkland

Cause No. 70 C 1427 Date Oct. 20, 1977

Title of Cause—Appleton Electric Company, etc. vs. Advance-United Expressways, et al.

Brief Statement of Motion—Motion to amend this court's order of May 12, 1977 by deft.

Enter memorandum opinion and order.

The motion of defendant Graves Truck Lines, Inc. to amend this Court's order of May 12, 1977 is granted. (see Draft)

Kirkland, J.

APPENDIX 4

UNITED STATES DISTRICT COURT
Northern District of Illinois
Eastern Division

APPLETON ELECTRIC COMPANY, an Illinois corporation, individually and on behalf of all others similarly situated,
Plaintiffs,
vs.
ADVANCE-UNITED EXPRESSWAYS, et al.,
Defendants.
No. 70 C 1427

MEMORANDUM OPINION AND ORDER

This matter is before the Court on a Motion to Amend this Court's Order of May 12, 1977 by defendant Graves Truck Lines, Inc. That Order denied, *inter alia,* defendant Graves' Motion to Vacate a Default Judgment entered against it and its Motion to Quash Garnishment proceedings begun against Sears, Roebuck & Company. However, since the default judgment was not certified as a final judgment pursuant to Rule 54(b), Federal Rules of Civil Procedure, this Court's Order also stayed the garnishment proceedings pending final determination of all matters in this case.

Defendant Graves' Motion to Amend this Court's Order requests that language required by 28 U. S. C. § 1292(b) be added to the Order. Such language would enable defendant Graves to seek an immediate appeal of this Court's Order.

Defendant seeks to challenge the method and procedure by which the default judgment was entered and not merely to contest the substantive validity of such Order.

Plaintiffs contend that the preferable method of obtaining appellate review is for this Court to direct the entry of a final judgment order pursuant to Rule 54(b), Federal Rules of Civil

Procedure. Plaintiffs claim they would then serve all carriers against whom a default judgment was previously entered. This would start the time running in which any of these parties could file an appeal.

Defendant contends that plaintiffs' suggested method is inappropriate since final judgment cannot be entered against the carriers in default until actual claims are made against them. Defendant asserts that it is the *only* carrier with standing to challenge the Default Order of September 10, 1975 since claims were made and judgments entered against it pursuant to the procedure in the Default Order. Further, defendant claims that resolution of issues pertaining to the entry of the default order and judgments will expedite and simplify the ultimate conclusion of the entire suit for all parties. This Court agrees.

Accordingly, defendant Graves' Motion to Amend this Court's Order of May 12, 1977 is granted.

CONCLUSION

The Motion of defendant Graves Truck Lines, Inc. to Amend this Court's Order of May 12, 1977 is granted.

Accordingly, the Order of May 12, 1977 is amended to add the following paragraph:

> This Court is of the opinion that the Order of September 10, 1975 involves a controlling question of law concerning the constitutionality of the procedure by which the Default Order was entered as to which there is substantial ground for difference of opinion. An immediate appeal from the Order may materially advance the ultimate termination of the litigation.
>
> Accordingly, the Court hereby certifies the question of law for immediate appeal pursuant to 28 U. S. C. § 1292 (b).

Enter: /s/ ALFRED Y. KIRKLAND
Alfred Y. Kirkland,
Judge

Dated: Oct. 20, 1977

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

APPLETON ELECTRIC COMPANY,
Plaintiff,
vs.
ADVANCE-UNITED EXPRESSWAYS, et al.,
Defendants.
No. 70 C 1427

ORDER

This cause was heard on the motion of APPLETON ELECTRIC COMPANY, individually and on behalf of all members of the plaintiff class, due notice having been served and the Court being fully advised in the premises;

IT IS HEREBY ORDERED THAT:

1. The defendants named in the attached Schedules "A, B, C, D and E" are hereby defaulted for failure to appear and/or to answer the plaintiff's complaint.

2. All defendants referred to in Schedules A, B, C, D and E of paragraph 1 above are hereinafter referred to as "Defaulted Defendants."

3. Any member of the plaintiff class (hereinafter referred to as "Claimant" or "Shipper") who desires to make a claim for refund against any Defaulted Defendant, as defined in this Order and as defined in this Court's order of September 10, 1975, to whom the Claimant paid freight charges under the applicable ICC Docket No. 34971 tariffs for shipments between May 21, 1968 and August 29, 1969, inclusive, shall prepare and serve the claim on the attorneys for the plaintiff class *by*

October 1, 1976. The form of claim shall be substantially the same as the form attached hereto as Schedule "F" and shall contain substantially the information called for therein. Each claim shall be supported by paid freight bills or other appropriate evidence. Each claim form shall also be accompanied by a verification that the claim is true and correct and that neither the Shipper nor any of its agents or employees have filed claims against any connecting line or other Carrier on the same shipment. On application of the attorneys for the plaintiff class, the Clerk of this Court shall enter judgment in favor of each Claimant against each Defaulted Defendant for 100% of the verified claim plus interest at the rate of 6% per annum from August 29, 1969 and shall enter judgment in favor of the attorneys for the plaintiff class against each Defaulted Defendant for 33⅓% of the total of each judgment entered in favor of each Claimant against each Defaulted Defendant.

Enter:

Judge

c/o CANEL & CANEL
33 North Dearborn Street
Chicago, Illinois 60602
372-7900

SCHEDULE "A"

List of Defendants who signed and returned to the Clerk of the Court the green certified mail cards but who never responded to the lawsuit in any other way.

Adams Trucking Co.
Adkins Cargo Express, Inc.
Alabama Highway Express, Inc.
All States Freight, Inc.
American Transportation, Inc.
Ar-Dees Alaska Truck Lines, Inc.
Atkinson Lines, Inc.
Atomic Transfer Limited
Atwood Motor Freight
B & F Transfer Line
Bartz Cartage Company, Inc.
Bennett Truck Line
Berglund Trucking, Inc.
Bern's Truck Line, Inc.
Best-Way Truck Line (Mo.)
Border Freight Lines, Inc.
Brainard-Bruno Transfer
Brooks Transportation Company
Burlington Truck Lines, Inc.
C. & S. Cartage
Canadian Pacific Transport Company, Limited
Canova Transfer
Capitol Freight Lines, Inc.
Carriers, Inc.
Central Oklahoma Freight Lines, Inc.
Central Transport, Inc.
Central Wisconsin Motor Transport Company
Charleston Transfer

Chaska-Carver Motor Express
The Chesapeake and Ohio Railway Company
Chicago, Rock Island and Pacific Railroad Company
Clark Truck Co., Inc.
Corey & Evans, Inc.
Cotton Transfer, Inc.
D & H. Truck Service
D. M. Davis, Inc.
Davis Truck Line
Denver Chicago Trucking Company, Inc.
Dickerson Transfer
Diffley Truck Line, Inc.
Durrett Transfer, Inc.
Eastern Motor Dispatch, Inc.
Erickson Trucking Service
Erieview Freight Lines, Inc.
Ess-Jay Cartage, Inc.
Fillipi Truck Line, Inc.
Fort Smith-Sallisay Transfer
Freeman Transfer, Inc.
Frisco
Geneva Transfer, Incorporated
Germann Bros. Motor Transportation, Inc.
Wayne Glodery
Gottula Trucking and Transportation, Inc.
Gragg Truck Line
Groepper Transfer
Haeckl
Hall Freight Lines, Inc.
O. K. Heilman, Inc.
Herrin Transportation Company
Highland Motor Service, Inc.
Hill Freight Lines, Inc.

Hi-Point Trucking and Storage, Inc.
Hughey Transportation Co.
Hyman Motor Service Co.
Iberia Transfer Co.
Indianapolis-Kansas City Motor Express Co.
Indianapolis & Southern Motor Express, Inc.
Inland Motor Freight Lines, Inc.
Ipswich Truck Line
W. Ford Johnson Cartage, Inc.
K & B Truck Lines, Inc.
K & W Trucking
Keeshin Transport System, Inc.
Key Trucking Co., Inc.
Kingsway Freight Lines Limited
Kipp Transfer
Kurgan Cartage Co., Inc.
Lakehead Freightways Limited
Lamp Trucking Co.
Lang Transit Company
C. E. Lau
Lavery Transportation, Inc.
Leonard Express, Inc.
Logan Valley Transfer
M & R Transfer
McCammon Truck Line
McClain Dray Line, Inc.
Doran R. McComas
McNeil Truck Line
Meade Transfer
Mid City Freight Lines, Inc.
Middlewest Nebraska Motor
Morrison Motor Freight, Inc.
Murphy Motor Express, Inc.

National Cartage Co. (Ind.)
National Cartage Co. (Okla.)
Louis Navinsky
North Shore Freight Lines, Inc.
Northern Pacific Transport Company
Ohio Freight Lines, Inc.
Ohio Southern Express, Inc.
P. J. Motorway, Inc.
The Pittsburgh Transfer and Storage Company
Ponca Motor Express
Burl Prentice
R and L Truck Lines
R & R Truck Line, Inc.
The Reinhardt Transfer Company
Revell Transit Company, Incorporated
Robertson Motor Freight, Inc.
Robinson Freight Lines, Inc.
Rolla Truck Lines, Inc.
Roscoe's Freight Line
Rush Truck Line
St. Cloud-Duluth Truck Line
Sanderson Freight Line
A. W. Schmidt Transfer
Schrieffer's Motor Service, Inc.
Schuyler Transfer
Service Transfer
Sheridan Truck Line—Ark.
M. C. Slater, Inc.—Ill.
John W. Snape, Inc.
Soo-Security Motorways, Ltd.
Southwestern Motor Transport, Inc.
Speckeen Transportation Co., Inc.
Sudden Service Bonded Hauling Co., A Corporation

Super Sonic Service, Inc.
Swanson Motor Service
Swanton Truck Lines, Inc.
Syracuse Transfer
Texhoma Freight Lines
Topeka Truck Line
Trans-Cold Express, Inc.
Trogolo Transfer
Tucker Freight Lines, Inc.
Valley City Transfer, Inc.
Viking Freight Company
Wahoo Transfer
Waldron Truck Line
Warner & Sons Trucking Co.
Warner Freight Lines, Inc.
White Motor Express, Incorporated
Wison Freight Forwarding Company
Wilson's Motor Transit
Yule Truck Lines, Inc.
Yuma County Transportation Co.
Zip Transfer, Inc.

SCHEDULE "B"

List of Defendants Who Are Presumed to Have Received the Original Mailing. There Are No Green Certified Mail Cards on File at the Clerk's Office, but Neither Are There Any of the Returned Envelopes as in the "NR" List.

Anderson Motor Service—St. Louis
W. N. Daul Transfer Lines
Herder Truck Lines, Inc.
Lyons Transportation Lines, Inc.
Milliken Johnstown Truck Line, Inc.
Mills Film Transfer
Rapid Film Service
Rauch Truck Lines, Inc.
Southern-Plaza Express, Inc.
United Freight Lines

SCHEDULE "C"

List of Defendants Who Opted Out and Then Opted Back Into the Defendant Class, but Did Not Get Picked Up Onto Any Attorneys List.

Direct Transports—Kansas City, Kan.
Fox Valley Express—Aurora, Ill.
Funkhouser Truck Service—Cambridge City, Ind.
Lincoln Transfer—Lincoln, Ill.
Miller's Transfer—Minden, Neb.
Nelson Transfer, Inc.—Buchanan, Michigan
Northeast Motor Express—Waterloo, Ia.
Point Express, Inc.—Charleston, West Va.
South Bend Freight Line, Inc.—South Bend, Ind.
Southwest Freight Lines, Inc.—Kansas City
Zillmer Transfer—Sparta, Wisconsin

SCHEDULE "D"

List of Defendants Who Opted Out and Were Served by the U. S. Marshall with the 287 Defendants.

Black River Express, Inc.—(Mo.)

Commercial Motor Freight, Inc. of Indiana—Indianapolis, Ind.

Deaton, Inc.—Birmingham, Ala.

Hyman Transportation Company—Aberdeen, S. D.

Jones Transfer Company—Monroe, Michigan

Motor Express, Incorporated—Cleveland, Ohio

Ozark Transfer Company—Ozark, Mo.

SCHEDULE "E"

List of Defendants Who Received the Original Notice of This Action by Certified Mail and Then Elected to Opt Out of the Defendant Class. Subsequently, They Paid Attorneys Fees to Peter V. Fazio; and, Were Included on Various Lists of Defendants in the Second Current Report of Peter V. Fazio, Sr., Previously Filed in This Action.

Campbell "Sixty-Six"

Chicago & Eastern Illinois Railroad

I & S McDaniel

Murphy Motor Express, Inc.

#1

CLAIM FORM

(To be used where paid freight bills are attached to claim form.)

CLAIMANT: _____

_____

_____

CARRIER: _____

_____

_____

	Total Charges		Refund Calculated
Shipments under 5,000 lbs.	_____	@ 4.76% =	_____
Shipments over 5,000 lbs.	_____	@ 2.91% =	_____
		TOTAL	_____

NAME AND TELEPHONE OF PERSON TO BE CONTACTED WITH ANY QUESTIONS IN RELATION TO THIS CLAIM:

NAME: _____ PHONE: _____

#2

CLAIM FORM

(To be used where paid freight bills are not attached to claim form.)

NAME OF CLAIMANT: _____
ADDRESS: _____
_____

NAME AND TELEPHONE OF PERSON TO BE CONTACTED WITH ANY QUESTIONS IN RELATION TO THIS CLAIM:

NAME: _____ PHONE: _____

NAME OF CARRIER AGAINST WHICH CLAIM IS MADE: _____

Date of Shipment	Pro #	Origin	Destination	Tariff under which rated	Wgt. (Lbs)	Rate Pd. ($)	Chgs. Pd.	Rate ($/Cwt)	Chgs ($/Cwt)	Total over charge

Form of

PROOF OF SERVICE

STATE OF _____)
) SS.
COUNTY OF _____)

_____, being first duly sworn, on oath deposes and states that he mailed the attached claim form(s), exhibits and verification of claim(s) by addressing the same to _____ (Carrier) at _____ (Street or P. O. Box), _____ (City), _____ (State) (Zip Code), with postage prepaid, and depositing the same in the United States Mail at _____ (Street), _____ (City), _____ (State) (Zip Code) on _____ (Month-Day-Year).

_____

Subscribed and sworn to before me this_____day of_____, 1975.

_____
Notary Public

VERIFICATION OF CLAIM

I, _____, being first duly sworn say:

1. I am the shipper who paid the freight charges for which claim is made.

(or)

1. I am the shipper or agent of the shipper who paid the freight charges for which claim is made.
2. Neither the shipper nor any of its agents or employees has filed a claim against any connecting line or other carrier based on the same shipments for which claim is made herein.
3. I verify that the included claims, to the best of my knowledge, are claims under ICC Docket 34971 for paid freight charges between May 21, 1968 and August 30, 1969, inclusive.
4. I make this verification UNDER PENALTY OF PERJURY AND UNDER PENALTY OF CONTEMPT OF THIS COURT.

_____

Subscribed and sworn to before me this_____day of_____, 1975.

_____